

STATE OF MICHIGAN
IN THE SUPREME COURT

GERARD J. WIATER,

Plaintiff-Appellee,

-vs-

GREAT LAKES RECOVERY
CENTERS, INC.,

Defendant-Appellant.

Supreme Court No. _____

Court of Appeals No. 250384

Lower Court No. 03-40316-NO

128139
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**PLAINTIFF/APPELLEE'S RESPONSE TO
DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

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FILED

MAR 24 2005

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

STATEMENT OF PLAINTIFF'S POSITION

This is an Application for Leave to Appeal the Decision of the Michigan Court of Appeals dated January 27, 2005, Court of Appeals Case number 250384, which reversed the Decision granting Defendant/Appellant's Motion for Summary Disposition granted by the Circuit Court for the County of Marquette, 25th Judicial Circuit. The last date to file their Motion to Appeal should have been 21 days from January 27, 2005 or February 17, 2005. Defendant's Application is untimely and should be denied. The Plaintiff/Appellee, Gerard J. Waiter, requests that this Honorable Court deny Defendant/Appellant's Application for Leave to Appeal.

OPPOSITION TO APPLICATION FOR LEAVE

Plaintiff agrees with the Defendant that slip and falls are a prominent feature of Michigan litigation and personal injury claims, or at least that they have been over the past 30 years. This case is very similar to many other slip and falls that occur in winter conditions here in Michigan. While Michigan law has changed considerably over the last ten years, primarily under the open and obvious doctrine, this case is unique in that there were "special aspects" according to the Court of Appeals and the Plaintiff that distinguish it from other cases involving the open and obvious doctrine.

Before the Plaintiff argues this issue, he feels it is necessary to raise the

timeliness issue in this application for leave to appeal. The Michigan Court of Appeals Decision was dated January 27, 2005. The Court Rules give an Appellee 21 days to file his Claim of Appeal. This claim was not filed until March 2, 2005. Therefore, this Application for Leave should be denied on the procedural grounds that it was not timely.

At the time this case was heard by the Court of Appeals, we had three experienced and respected Judges hearing this case who rendered a unanimous decision. From the beginning, the Plaintiff has argued that a Defendant cannot intentionally ignore a dangerous condition on his property if he has prior knowledge of that danger and chooses to ignore it leaving invitees exposed to these unreasonable risks of harm. In this case, there was substantial testimony that the Defendant had been warned several times over a period of one week that they had an extremely black ice condition in their parking area and that they were out of salt to be used on that parking lot. Their own employee testified that he had put them on notice for several days before this accident and the Defendant failed to take any action to prevent this accident.

This is not a slippery condition that had been created after a storm or cold weather. This condition existed for a minimum of one week before the accident. The Defendant chose to ignore the danger and expose their business invitees to these black ice conditions.

The Court of Appeals stated:

“However, the trial court erred by granting summary disposition in favor of defendant because a reasonable person could conclude that the situation involved special aspects that rendered the open and obvious danger posed by the ice unreasonably dangerous. First, LaVictor indicated in his deposition testimony that it was his job as a resident of the facility to throw salt on the ice in the parking lot the morning of the incident but that he could not do so because there was no salt at the facility. Accordingly, there was evidence that defendant know or should have known of the icy condition of the parking lot and failed to respond to it within a reasonable time.”

The Plaintiff believes that the Court of Appeals Decision is a thoughtful, well reasoned decision and should be allowed to stand.

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Dated: MAR 22 2005